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No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHRYN GONZALES, and LESLIE GONZALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is com-

[1] Pursuant to 37.6, *amici curiae* International Municipal Lawyers Association ("IMLA") and National League of Cities ("NLC") disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

prised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues, and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program has served municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before this Honorable Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States cities, villages, and towns and more than 135,000 local elected officials. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The senseless tragedy that precipitated the underlying legal questions disturbs and offends *amici* and their members. The grievous facts, however, must not blot out the proper resolution of the important constitutional issues presented by the Town of Castle Rock's petition. The decision in this case by the Tenth Circuit Court of Appeals is so dramatically separated from the other circuits which have decided this issue that intervention by this Court is necessary to prevent future litigation on even more tenuous circumstances. *Amici*, as an advocate for the interest of local governments and the communities that they serve, file this brief on behalf of their

members nationwide. Letters from both parties consenting to the filing of this *amici curiae* brief are on file with the clerk.

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts as presented by Petitioner, Town of Castle Rock, Colorado.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT HAS USED THE DUE PROCESS CLAUSE TO IMPOSE AN UNREASONABLE DUTY ON LOCAL LAW ENFORCEMENT ENTITIES AND, MORE BROADLY, MUNICIPAL GOVERNMENTS TO PROTECT CITIZENS FROM ONE ANOTHER.

The due process clause is "a restraint on the power of the States." *The Slaughterhouse Cases* 83 U.S. (16 Wall.) 36, 80 (1873). "It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to insure those interests do not come to harm through other means." *DeShaney v. Winnebago County Dept. Of Social Services*, 489 U.S. 189, 195 (1989).

The Tenth Circuit has created a property right out of whole cloth. The mere issuance of the restraining order was sufficient, in the opinion of the majority, to create a property right. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101, 1109 (2004), Pet. App., 11a-12a, 27a-28a. While this Court has held that entitlements are property interests to be protected by the due process clause, *see*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits), the mere existence of a court order has never been sufficient to create such a property interest.

The only decision of this Court that is remotely related is *Boddie v. Connecticut*, 401 U.S. 371 (1971) where this Court held that the Due Process Clause prevented the States from denying potential litigants the use of the courts, where such would be equivalent to preventing them an opportunity to be heard upon their claimed rights. *Id.* at 380. Here, both Mr. and Mrs. Gonzales had the ability to petition the state court for a modification of the protective order. Colo. Rev. Stat. § 13-14-102 (17.5) (2003).

The hallmark of a property right is an individual entitlement grounded in state law which cannot be removed except for cause. *Memphis Light, Gas & Water Division v. Kraft*, 436 U.S. 1, 11-12, (1978). There is no question that Colorado law entitled Mrs. Gonzales to the issuance of the restraining order protecting her and her children from being harassed or molested by her former husband. However, the Tenth Circuit has gone one step further and granted Mrs. Gonzales the entitlement to protection from any violation of the order. Liability for injury is present under this holding even if the Town had responded but, either did not do so fast enough or if the police were unable to locate Mr. Gonzales to prevent the death of the three girls.

When this Court has found that State action has resulted in a distinct alteration or extinguishment of a right or status previously recognized by State law, the procedural guarantees contained in the Fourteenth Amendment have been invoked. Here the Town of Castle Rock has done nothing to remove any right or status Mrs. Gonzales may have possessed. It has not denied to her a driver's license, *Bell v. Person*, 402 U.S. 535 (1971). It has not prevented her from a trade or otherwise licensed occupation, *Barry v. Barchi*, 443 U.S. 55, 64 (1979), nor has it deprived her of some welfare benefit generally available to all those who qualify. *Goldberg, supra.*

Moreover, this Court has repeatedly held that the deprivation of State created rights by the State does not violate the

due process clause unless those rights amount to a constitutionally protected property interest. *See, e.g., Baker v. McCollin*, 443 U.S. 137 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Screws v. United States*, 325 U.S. 91 (1945). To turn a mere expressed intent to protect a class, even if accompanied by procedure to facilitate protection, into a property right would convert every criminal statute, and possibly every statement of policy into a constitutional right.

In Colorado, protection orders are not merely issued in domestic relations cases, as was done here, but are also issued pursuant to Colo. Rev. Stat., §18-1-1001, in every case arising under the Colorado Criminal Code. In addition, such protective orders may be issued by a County Court Judge in assault cases and such orders may also be issued in criminal municipal ordinance violations. Colo. Rev. Stat. §18-1-1001. Thousands of these orders may be issued by the Courts in Colorado in any given year.

Nor is Colorado alone in mandating the arrest of persons who violate protective orders. Some 19 additional states require an arrest when a police officer has probable cause to believe that such orders have been violated. *See*, Conn. Gen Stat. Ann. § 46b-15a (2004) (foreign only); Del. Code. Ann. tit. 10, § 1046 (2004); Ky. Rev. Stat. Ann. § 403.760 (2004); Me. Rev. Stat. Ann. tit. 19-A, § 4012 (2004); Md. Code. Ann., Cts. & Jud. Proc. §3-1503.1 (2004); Minn. Stat. Ann. § 518B.01 (West 2004); Miss. Code Ann. § 99-3-7 (2004); Mo. Ann. Stat. § 455.085 (West 2004); Nev. Rev. Stat. Ann. 33.070 (West 2004); N.H. Rev. Stat. Ann. § 173-B:9 (2004); N.M. Stat. Ann. § 40-13-6 (West 1978); N.C. Gen. Stat. Ann. § 50B-4 (West 2004); N.D. Cent. Code § 14-07.1-11 (2004); Pa. Stat. Ann. tit 32, § 6113 (West 2004); S. C. Code Ann. § 16-3-1800 (West 2004); S.D. Codified Laws § 23A-3-2.1 (West 2004); Tex. Crim. Proc. Code Ann. Art. 14.03 (West 2004); Wash. Rev. Code Ann. §§ 26.50.110, 26.52.070 (West 2004); Wis. Stat. Ann. § 813.12 (West 2004).

To allow this decision to stand creates a potential liability for local law enforcement agencies that is staggering.

II. THERE IS NO UNAMBIGUOUSLY CONFERRED RIGHT UNDER 42 U.S.C 1983 TO BE PROTECTED.

Section 1983 provides a remedy for the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States. In order to have such a right, this Court has always required that the statute clearly benefit the individual claiming the right. *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979). Where a statute by its terms grants no private rights to any identifiable class, there can be no constitutional right. *Gonzaga University v. Doe*, 536 U.S. 273 284 (2002); *Touche Ross and Company v. Redington*, 442 U.S. 560, 576 (1979). This is in sharp contrast with the statute at the center of this controversy, which is a criminal statute punishing the violation of any protective order, thereby protecting society as a whole not just the holder of the protective order.

III. THE DECISION OF THE TENTH CIRCUIT ERODES THE CONCEPT OF QUALIFIED IMMUNITY.

Municipal employees who engage in constitutionally impermissible conduct, may nevertheless be shielded from liability for civil damages if their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court explained in *Saucier v. Katz*, 553 U.S. 194, (2001), there must be notice to the State actor that their conduct is unlawful. *Id.* at 206. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, it must be clear that in light of pre-existing law the unlawfulness of the

conduct is apparent. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the Tenth Circuit, the law is clearly established if there is a Supreme Court or Tenth Circuit decision on point, "or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier v. Duran*, 242 F.3d 905, 923 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001).

Until this case, there were no Supreme Court or Tenth Circuit cases which held that a restraining order, coupled with a statute mandating its enforcement, creates a constitutional protected property interest. *Gonzales* at 1117-18. The clear weight of authority in the other circuits is just the opposite. *See*, *Doe by Nelson v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990)(rejecting a procedural due process claim for failing to investigate child abuse, finding no "entitlement" in such procedures—no entitlement triggering due process protection in statutorily required child abuse investigation); *Jones v. Union County Tennessee*, 296 F.3d 417 (6th Cir. 2002) (holding, among other things, that a state actor's violation of a Tennessee statute providing, "[t]he court shall cause a copy of the [family violence] petition . . . to be served upon the respondent at least five (5) days prior to such hearing" did not qualify as a state created liberty or property interest under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Doe v. Hennepin County*, 585 F.2d 1325 (8th Cir. 1988)(rejecting *Roth*-type claims in the provision of social services under a mandatory child abuse statute—this case was decided pre-*DeShaney*) and *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996)(rejecting a procedural due process claim for failing to effectuate child abuse protective services, finding there is no entitlement to such protective services under mandatory child abuse statute).

Because there is now a Tenth Circuit Opinion finding that a statute mandating its enforcement through arrest or issuance

of an arrest warrant is a property right, any statute of a jurisdiction within the Tenth Circuit which mandates some action by the government creates a property right. This could include statutes or local ordinances which require the issuance of a building or zoning permit.

As this constitutional right is now clearly established in the Tenth Circuit, any failure to enforce this right, whether through delay, lack of resources, or other pressing emergencies, now creates liability for a lack of enforcement through no fault of the State actor.

Certiorari is therefore warranted to prevent the potential liability of individual officers who fail to enforce any mandatory statute.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ certiorari.

Respectfully submitted,

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